

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10

11 BRIAN MCLUCAS, ) CR 99-01168-RSWL  
12 Petitioner )  
13 v. ) ORDER RE: Brian McLucas'  
14 ) Petition to Amend  
15 UNITED STATES OF AMERICA, ) Judgment Imposing Fine  
16 Respondent. ) [392]  
17 \_\_\_\_\_ )  
18

19 Currently before the Court is Petitioner Brian  
20 McLucas' ("Petitioner") Petition to Amend Judgment  
21 Imposing Fine ("Petition") [392]. Having reviewed all  
22 papers submitted pertaining to this Petition, the Court  
23 **NOW FINDS AND RULES AS FOLLOWS:**

24 Petitioner Brian McLucas' Petition is **DENIED**.  
25  
26  
27

28 ///

1 In his instant Petition, Petitioner seeks amendment  
2 of this Court's January 20, 2004, judgment imposing a  
3 \$15,000 fine, relying upon on Federal Rule of Criminal  
4 Procedure 36. Petitioner also alleges that the Court's  
5 imposition of the fine does not adhere to the  
6 requirements set forth in 18 U.S.C. § 3572(a), and  
7 concludes that the fine should be vacated.

8 Petitioner does not cite to any legal authority  
9 that would allow this Court to amend its January 20,  
10 2004, judgment. "A district court does not have  
11 inherent power to resentence defendants at any time."  
12 United States v. Ceballos, 671 F.3d 852, 854 (9th Cir.  
13 2011) (citation omitted). The district court's  
14 "authority to change a sentence must derive from some  
15 federal statutory authority." United States v.  
16 Caterino, 29 F.3d 1390, 1394 (9th Cir. 1994) (citation  
17 omitted). It may also "flow from either the court of  
18 appeals mandate . . . or from Federal Rule of Criminal  
19 Procedure 35." Ceballos, 671 F.3d at 854 (citations  
20 omitted).

21 Although Petitioner relies upon Federal Rule of  
22 Criminal Procedure 36, Rule 36 is inapplicable here.  
23 Federal Rule of Criminal Procedure 36 allows the  
24 district court to correct clerical errors: "After  
25 giving any notice it considers appropriate, the court  
26 may at any time correct a clerical error in a judgment  
27 order, or other part of the record, or correct an error  
28 on the record arising from oversight or omission." The

1 Ninth Circuit has held that "Rule 36 is a vehicle for  
2 correcting *clerical* mistakes but it may not be used to  
3 correct judicial errors in sentencing." United States  
4 v. Penna, 319 F.3d 509, 513 (9th Cir. 2003). "An error  
5 is clerical if 'what is spoken, written, or recorded is  
6 not what the court intended to speak, write or  
7 record.'" United States v. Trulock, No. CR 06-1031-  
8 PHX-EHC, 2010 WL 1842258, at \*2 (D. Ariz. May 6, 2010)  
9 (citing United States v. Kaye, 739 F.2d 488, 491 (9th  
10 Cir. 1984)). Moreover, "Rule 36 does not permit any  
11 substantive changes or amendments to the sentence but  
12 permits correction of any technical or clerical  
13 errors." Id.

14 Federal Rule of Criminal Procedure 36 cannot vest  
15 the Court with the authority to amend Petitioner's  
16 sentence, given that the sentence spoken, written, and  
17 recorded was the sentence the Court intended to give  
18 Petitioner. The record does not show that there was a  
19 technical or clerical error in the Court's January 20,  
20 2004, judgment. Additionally, a request to waive the  
21 \$15,000 fine would constitute a substantive change or  
22 amendment to the sentence, which is not authorized  
23 under Rule 36.

24 Moreover, Petitioner cannot move this Court to  
25 waive or vacate the \$15,000 fine either under 18 U.S.C.  
26 §§ 3572 or Section 3664, statutes that outline the  
27 requirements for the imposition of fines, including  
28 fines for restitution. Certain provisions in these

1 statutes authorize a district court to amend a judgment  
2 by adjusting a schedule of payments for a fine, but  
3 only in limited circumstances. See 18 U.S.C. §§  
4 3572(d)(3), 3664(k). For example, when a district  
5 court renders a "judgment for a fine which permits  
6 payments in installments," it may "adjust [a] payment  
7 schedule, or require immediate payment in full" if the  
8 defendant notifies "the court of any material change in  
9 the defendant's economic circumstances." 18 U.S.C. §  
10 3572(d)(3). A district court may take a similar action  
11 in cases where a defendant has been ordered to pay  
12 restitution to victims of his criminal acts through  
13 installment payments. 18 U.S.C. § 3664(k).

14 Sections 3572 and 3664 mainly outline the  
15 requirements and procedures for imposing fines, and any  
16 subsections that authorize the district court to amend  
17 a fine apply exclusively to fines permitted to be paid  
18 in installments. See 18 U.S.C. §§ 3572(d)(3), 3664(k).  
19 Consequently, these provisions only allow the Court to  
20 alter an installment payment schedule, not waive the  
21 actual fine. In this case, the \$15,000 fine imposed  
22 upon Petitioner was ordered to be paid in full  
23 immediately at the time the judgment was rendered. See  
24 Pet., Ex. B (Transcript), at 15:10-14. Even if the  
25 Court had permitted installment payments, Sections 3572  
26 and 3664 would not authorize this Court to entirely  
27 waive the \$15,000 fine imposed on Petitioner.

28 If Petitioner had relied upon Federal Rule of

1 Criminal Procedure 35 as the basis for his request for  
2 amendment of the Court's judgment, which he did not,  
3 the Court would still lack the authority to amend  
4 Petitioner's fine. Rule 35 authorizes a district court  
5 to correct or reduce a sentence "within 14 days" if the  
6 sentence "resulted from arithmetical, technical, or  
7 other clear error." Fed. R. Cr. P. 35(a). Rule 35  
8 also provides: "Upon the Government's motion made  
9 within one year of sentencing, the court may reduce a  
10 sentence if the defendant, after sentencing, provided  
11 substantial assistance in investigating or prosecuting  
12 another person." Fed. R. Cr. P. 35(b). Federal Rule  
13 of Criminal Procedure 35(a) does not apply here because  
14 it is limited to a correction of a sentence within 14  
15 days. As the Government's opposition indicates,  
16 Petitioner did not challenge the fine this Court  
17 imposed until he filed the current petition on May 24,  
18 2013--well beyond the limited time frame allowed for a  
19 revision or correction under Rule 35(a). Rule 35(b) is  
20 also inapplicable here because a motion to reduce a  
21 sentence for substantial assistance needs to be made by  
22 the Government, and not a defendant.

23 Finally, even if this Court were to characterize  
24 Petitioner's motion as a motion to vacate, set aside or  
25 correct a sentence pursuant to 28 U.S.C. § 2255, the  
26 Court would still lack authority to consider  
27 Petitioner's request for relief. Section 2255 "allows  
28 a federal prisoner claiming that his sentence was

1 imposed 'in violation of the Constitution or laws of  
2 the United States' to 'move the court which imposed the  
3 sentence to vacate, set aside or correct the  
4 sentence.'" Harrison v. Ollison, 519 F.3d 952, 955  
5 (9th Cir. 2008) (citing 28 U.S.C. § 2255). However, "a  
6 second or successive § 2255 petition may not be  
7 considered by the district court unless petitioner  
8 obtains a certificate [from the Ninth Circuit]  
9 authorizing the district court to do so." Alaimalo v.  
10 United States, 645 F.3d 1042, 1054 (9th Cir. 2011)  
11 (citing 28 U.S.C. § 2255(h)). The Ninth Circuit has  
12 defined a "successive" Section 2255 motion as one where  
13 "the basic thrust or gravamen of the legal claim is the  
14 same, regardless of whether the basic claim is  
15 supported by new and different legal arguments."  
16 United States v. Allen, 157 F.3d 661, 664 (9th cir.  
17 1998).

18       Petitioner already filed a motion under Section  
19 2255 on November 30, 2012 [376], which this Court  
20 subsequently denied on July 23, 2012 [389]. The  
21 present Petition has the "same basic thrust or gravamen  
22 of the legal claim" as Petitioner's first Section 2255  
23 motion, considering that both challenge the legality of  
24 this Court's January 20, 2004, judgment. As such, even  
25 if the Court were to characterize this present Petition  
26 as a Section 2255 motion, the Petition would have to be  
27 regarded as a "successive" Section 2255 motion.  
28 According to Section 2255(h), the Ninth Circuit must

1 approve the filing of any successive Section 2255  
2 motion. The record does not show that Petitioner  
3 secured this approval. Therefore, even if the Court  
4 construed the present Petition as a Section 2255  
5 motion, the Court would still lack the authority to  
6 rule on it.

7 For the reasons stated above, this Court does not  
8 have the authority to amend its judgment imposing the  
9 \$15,000 fine. Therefore, the present Petition is

10 **DENIED.**

11  
12 **IT IS SO ORDERED.**

13 Dated: August 2, 2013

14  
15 RONALD S.W. LEW

16 **HONORABLE RONALD S.W. LEW**

17 Senior, U.S. District Court Judge  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28